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**Kankakee County Training Center for the Disabled, Inc. and American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL-CIO.** Cases 25–CA–166729, 25–CA–166765, 25–CA–166785, 25–CA–168799, and 25–CA–168802

August 27, 2018

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS PEARCE  
AND MCFERRAN

On September 14, 2016, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief. The Respondent filed answering briefs to the General Counsel's and the Charging Party's exceptions, and the General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions. The General Counsel and the Charging Party also filed reply briefs to the Respondent's answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>2</sup>

The Respondent provides work/life training to developmentally disabled individuals known as "clients" or "consumers." In late 2014, the Union conducted an organizing campaign among the Respondent's employees. After the Union won the December 29, 2014 representation election, the Board certified it as the unit employees' exclusive collective-bargaining representative on January 7, 2015. The parties began bargaining for an initial collective-bargaining agreement

a few months later. At the time of the hearing in this case, they were still in active negotiations but had yet to reach an agreement.

This case involves several allegations of unfair labor practices by the Respondent. We adopt the judge's dismissal of the allegations that the Respondent violated Section 8(a)(1) of the Act by separately instructing employees Brian Mazzuchi and Priscilla Williams not to talk about the Union during working time,<sup>3</sup> and Section 8(a)(3) and (1) by suspending and terminating Williams. We also adopt his finding that the Respondent violated Section 8(a)(5) and (1) by failing to provide requested personnel information to the Union.<sup>4</sup> For the reasons discussed below, we adopt the judge's dismissal of the allegation that the Respondent unlawfully subcontracted unit information technology (IT) work to Duratech. Contrary to the judge and our dissenting colleague, however, we find that the Respondent unlawfully subcontracted unit IT work, a second time, to Megaplex without bargaining with the Union.<sup>5</sup>

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<sup>3</sup> Based on credibility, the judge found that Production Supervisor Beverly Flowers counseled Mazzuchi for interrupting work, not for talking about the Union. Even though the judge did not explicitly address Williams' disputed testimony that Flowers subsequently told her that Flowers had counseled Mazzuchi for talking about the Union, we find that by crediting Flowers' testimony, the judge implicitly discredited Williams' testimony.

<sup>4</sup> The Respondent argues on exception that it was required to withhold this presumptively relevant information under Sections 2 and 5 of the Illinois Personnel Record Review Act (IPRRA), 820 ILCS 40 et seq., and that the judge erred by failing to balance this requirement against the Union's need for the information. We find no merit in this position. Balancing is appropriate only where the employer shows that it had a legitimate and substantial confidentiality interest in the requested information, notified the union of this interest in a timely manner, and offered a reasonable accommodation. See, e.g., *Olean General Hospital*, 363 NLRB No. 62, slip op. at 6–8 (2015). Even assuming that the Respondent met the notice requirement, it did not satisfy the other two criteria. First, the Respondent failed to establish the necessary confidentiality interest. Neither of the IPRRA sections relied on by the Respondent—one requiring an employer to allow an employee, on request, to inspect any personnel documents that may have been the basis for an employment action, the other allowing an employee who has filed a grievance against the employer to designate a union representative to review his personnel records—barred the Respondent from disclosing the requested personnel information to the Union. And while IPRRA subsection 7(1) generally prohibits an employer from disclosing an employee's disciplinary records to outside parties, it is explicitly inapplicable to the "labor organization representing the employee." Second, in refusing the Union's request, the Respondent failed to offer any accommodation to the Union.

<sup>5</sup> There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by subcontracting unit production work to temporary employees in 2015 without providing the Union with notice and an opportunity to bargain.

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<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall amend the judge's Conclusions of Law and Remedy and modify his recommended Order to conform to the violations found and to the Board's standard remedial language. We shall further modify his recommended Order to provide for the posting of the notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010). We shall substitute a new notice to conform to the Order as modified.

## The Allegedly Unlawful Subcontracting of Unit IT Work

### A. Facts<sup>6</sup>

In early October 2015, Sherry Gregg, the Respondent's lone IT worker and a member of the bargaining unit, resigned her position. Several days later, on October 14, the Respondent informed the Union by email of Gregg's resignation and its plan to replace her. It explained that:

This is very important position here and we will be looking at options with this. At the present time we don't have anyone in house with the skills or qualifications for this job. We are looking at outsourcing this right now until we see which way is cost effective for KCTC. I want you to have notice that we are looking at a company maintaining the computers as it's needed at this time until we decide what is best.

The Union responded that outsourcing the IT work would be an unlawful unilateral change and that the Respondent had a duty to bargain over it. The Respondent countered that:

Until we sit and talk, we have to have someone. The computers have went down and KCTC funding is billed through the computer systems, plus all communication as you know. We have the need for them to be fixed and running. We can either schedule to meet right away or wait until October 21.

About a week later, consistent with its stated intent, the Respondent eschewed bargaining and employed a contractor called Duratech to replace a computer server, which took about 2 weeks. Within a few months, another of the Respondent's servers crashed, and the Respondent again hired a contractor—this time Megaplex—to replace it and to recover information that had been located on that server. As Graham testified, Megaplex “came in, and we installed a whole new server.” At the hearing, Graham conceded that the Respondent did not notify the Union of this second instance of subcontracting. She also testified that she “[did not] remember” whether the Respondent ever attempted to fill the unit IT position.

### B. The Judge's Findings

The judge dismissed the allegation that the Respondent violated Section 8(a)(5) and (1) by subcontracting unit IT work without bargaining with the Union. Addressing only the Duratech subcontracting, he found that the Respondent established a compelling business

justification for its refusal to bargain over this change. According to the judge, “[the Respondent's] computer system crashed[,] curtailing its ability to bill for work performed and, presumably, obtain funding for its operations, and without funding, they would be unable to pay their employees.” Having noted at the beginning of his decision that the complaint alleged only that the Duratech subcontracting was unlawful, the judge did not separately consider whether the Respondent's later subcontracting of IT work to Megaplex met the requirements of the Act.

### C. Discussion

The General Counsel and the Charging Party each except to the judge's failure to find the Respondent's Megaplex subcontracting unlawful. The Charging Party also excepts to the judge's finding that the Duratech subcontracting was lawful. In its answering briefs, the Respondent counters that:

The unrebutted evidence is that Respondent had multiple servers go down which are necessary for its billing, client care and other exigent business circumstances. The Judge properly limited his finding to the occurrence alleged in the complaint. Nevertheless, given the finding of the [judge], one would be hard pressed to see how other instances of a similar nature would result in a different conclusion.

Thus, the Respondent argues that an unfair labor practice finding would be improper on both substantive and procedural grounds.

We agree with the judge, on the particular facts here, that the Respondent's subcontracting to Duratech was not unlawful. However, unlike our dissenting colleague, we find merit in the General Counsel's and the Charging Party's exceptions regarding the Megaplex subcontracting.

We first address the substance of these allegations. During negotiations for a collective-bargaining agreement, an employer is obligated to refrain from making unilateral changes to employees' terms and conditions of employment unless the parties reach overall impasse. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd. mem. sub nom. Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). However, the Board has recognized an exception to this rule “when economic exigencies compel prompt action.” *Id.* The burden for meeting this exception is heavy: it applies only to “extraordinary events which are ‘an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.’” *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995).

<sup>6</sup> The judge found the following facts based on his review of CEO Graham's testimony and email correspondence between Graham and Union Agent Jeff Dexter.

Applying this standard to the specific facts presented here, we agree with the judge that the initial subcontracting to Duratech was lawful.<sup>7</sup> However, its later subcontracting to Megaplex did not meet this high standard. It is indisputable that the server crash that led to the Megaplex subcontracting was in no way unforeseen. The Respondent had recently subcontracted with Duratech to fix an identical computer system crash, and was therefore on notice of the possibility that the problem might recur, and with the resignation of Gregg, it lacked IT coverage. Nonetheless, even though the Union was insisting in negotiations that any proposed outsourcing of IT work required bargaining, the Respondent again contracted it out—this time to Megaplex—without notice to the Union. By this time, the Respondent had several months to hire new unit IT workers, but made no apparent effort to do so. Thus, if the Megaplex allegation is properly before us, it is clear that the Respondent violated the Act.<sup>8</sup>

Regarding the Respondent's argument that it would be procedurally improper to find this violation, we acknowledge that the complaint alleged that "[a]bout October 14, 2015, Respondent outsourced the bargaining unit work in the IT department," and that the Respondent thereby violated Section 8(a)(5) and (1). While not named in the complaint, Duratech is the IT company with which the Respondent contracted in mid-October 2015. As the Respondent correctly points out in its answering briefs, the complaint did not separately allege the subsequent Megaplex subcontracting to be an unfair labor practice. Nonetheless, "[i]t is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the

issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). The Board applies this test "with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses." *Id.* We find both prongs of *Pergament* satisfied with regard to the Megaplex allegation and that, contrary to our colleague's argument, the Respondent therefore had notice of the allegation.<sup>9</sup>

First, the Megaplex allegation is closely connected to the Duratech allegation. The two plainly share the same ultimate issue—whether the Respondent's refusal to bargain over the subcontracting of its IT work was unlawful. They are also part of the same set of facts. The Duratech and Megaplex subcontracting were close in time and involved virtually identical computer hardware malfunctions, requiring replacement of the computer server.<sup>10</sup> Indeed, at the hearing, CEO Graham described Megaplex as simply "another [company] that . . . came in because we had our other server . . . crash, and we lost everything." Her testimony about the Megaplex subcontracting directly followed that about the Duratech subcontracting, was part of the same line of questioning by the General Counsel, and elicited no objection that it was beyond the scope of the complaint. The two instances of subcontracting are inextricably linked, part and parcel of the Respondent's steadfast refusal to

<sup>9</sup> See, e.g., *Parts Depot, Inc.*, 332 NLRB 733, 733–734 (2000) (fulfillment of *Pergament* test established notice); *Service Employees International Union, Local 32BJ v. NLRB*, 647 F.3d 435, 447 (2d Cir. 2011) (Board may find violation not specifically alleged if "parties had sufficient notice to satisfy due process—i.e., 'if the issue [wa]s closely connected to the subject matter of the complaint and has been fully litigated'" under *Pergament*); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349–350 (1938) (due process requirement satisfied because "record [showed] that [party] understood the issue and was afforded full opportunity to justify the action of its officers").

<sup>10</sup> The judge found that the Megaplex subcontracting occurred "[i]n about June 2016." However, Graham testified at the July 2016 hearing in this case that Megaplex performed this work "months ago roughly," and that it might have taken "months" because "it was a lot of work." Thus, the record reflects—and we find—that the Respondent actually subcontracted the work several months prior to June 2016.

Our colleague not only exaggerates the length of time between the Duratech and Megaplex subcontracting, he also misstates the nature of the work that each company performed, which involved the replacement of the server. His claim that Megaplex repaired a server instead of replacing it was apparently based on the judge's offhand remark that Megaplex merely repaired the server. As noted above, Graham testified that Megaplex "came in, and we installed a whole new server."

Regardless, these alleged differences would not alter our finding that the two instances are closely connected.

<sup>7</sup> Regarding the Duratech subcontracting, the related server outage occurred mere days after the Respondent's lone IT worker unexpectedly resigned, leaving the Respondent—through no fault of its own—unable to bill for work or process the necessary funding for its operations, and without any employee capable of addressing the problem. Under these particular circumstances, we find that the Respondent was temporarily privileged to act unilaterally.

<sup>8</sup> We reject the dissent's assertion that the record does not show that the Megaplex subcontracting involved unit work. As our colleague acknowledges, Graham testified that when the Respondent needed to fix major server issues, former IT worker Gregg would perform that work together with an outside contractor. He testified, Gregg "would not do that on her own. She would have somebody else come in on the outside to *help her do that*" (emphasis added). Graham further testified that it was not possible for the Respondent to "take 2 weeks to interview and try to get somebody in" to replace Gregg in October 2015 when the server needed to be replaced. The Respondent thereby conceded that a unit IT worker would have played a significant role in the server replacement and that at least some of the subcontracted IT work was unit work. We further note that the Respondent did not claim in its briefs to the Board that the Megaplex subcontracting did not involve unit work.

bargain with the Union over the performance of its IT work.<sup>11</sup>

Second, the parties fully litigated the Megaplex allegation. “[T]he determination of whether a matter has been fully litigated rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made.” *Pergament*, supra at 335. The Respondent has not shown that the lack of formal reference to this allegation in the complaint in any way compromised its defense. It does not dispute that it subcontracted IT work to Megaplex without bargaining with the Union. Graham, the Respondent’s CEO, provided the essential details in her testimony. The Respondent chose not to question her or any other manager or employee in an effort to further justify or explain its actions. And it does not argue that more explicit notice of this allegation would have altered its litigation strategy. Rather, it effectively concedes that the record contains all of the necessary evidence, stating in its answering briefs that the judge’s dismissal of the Duratech allegation makes it difficult “to see how other instances of a similar nature would result in a different conclusion.”<sup>12</sup> The Respondent therefore suffered no prejudice from the General Counsel’s failure to formally allege this particular violation.

In sum, the Respondent had sufficient notice of the Megaplex allegation to satisfy the requirements of due process. Graham’s testimony established the necessary elements of the Megaplex allegation, which overlapped in all material respects with the Duratech allegation included in the complaint.<sup>13</sup> Given the opportunity both during and after the hearing to present any additional evidence or argument that might have been pertinent to the Megaplex allegation, the Respondent opted to stand on the existing record in this case. The Board has consistently found unalleged violations to have been fully and fairly litigated under similar circumstances.<sup>14</sup>

<sup>11</sup> Contrary to our colleague’s suggestion, our finding that the Duratech subcontracting was lawful under *Bottom Line Enterprises*, supra, and *RBE Electronics*, supra, has no bearing on whether the two allegations are closely connected under *Pergament*.

<sup>12</sup> By that time, the General Counsel had explicitly addressed the Megaplex allegation in both his posthearing brief to the judge and his exceptions brief to the Board.

<sup>13</sup> Our colleague concedes that “the record includes some evidence pertaining to [this allegation],” but fails to appreciate its pervasiveness as well as the significance of Graham’s admissions.

<sup>14</sup> See, e.g., *Transpersonnel, Inc.*, 336 NLRB 484, 484–485 (2001) (high-ranking manager confirmed occurrence of unalleged violation during same months-long time period as similar alleged violations), enf. denied in relevant part on other grounds 349 F.3d 175, 180–183 (4th Cir. 2003); *Northern Wire Corp.*, 291 NLRB 727, 727 fn. 3 (1988)

We therefore find that the Respondent violated Section 8(a)(5) and (1) by subcontracting unit IT work to Megaplex.

#### AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondent violated Section 8(a)(5) and (1) of the Act.

(a) The Respondent failed and refused to furnish the Union with the information it requested on November 16, 2015, which is relevant and necessary for the performance of its duties as the exclusive collective-bargaining representative of unit employees.

(b) The Respondent unilaterally subcontracted unit production work in 2015.

(c) The Respondent unilaterally subcontracted unit information technology work to Megaplex in 2016.

#### AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to rescind (1) its unilateral 2015 subcontracting of unit production work, and (2) its unilateral 2016 subcontracting of unit information technology work, and restore the status quo ante regarding this work, until such time as the Respondent and the Union reach a collective-bargaining agreement or a lawful impasse based on good-faith negotiations.<sup>15</sup> The Respondent shall make whole its employees for any losses in earnings and other benefits which they may have suffered as a result of the Respondent’s unlawful unilateral subcontracting of unit production work and unit IT work. All payments to employees are to be computed in the manner set forth in

(employer had opportunity to solicit responsive testimony related to unalleged violation that occurred during same year-long period as similar alleged violations), enf. 887 F.2d 1313, 1321–1322 (7th Cir. 1989); *Furr’s Cafeterias, Inc.*, 251 NLRB 879, 879 fn. 3 (1980) (employer admitted facts of unalleged violation that “related to the heart of the complaint which allege[d] other instances of disregard of the obligation to bargain with the Union”), enf. mem. 656 F.2d 698 (5th Cir. 1981).

<sup>15</sup> At the compliance stage of these proceedings, the Respondent may introduce any evidence that was not available prior to the unfair labor practice hearing to demonstrate that restoration of the work would be unduly burdensome. See *St. Vincent Medical Center*, 349 NLRB 365, 368 fn. 5 (2007); *Lear Siegler, Inc.*, 295 NLRB 857, 861–862 (1989). The Respondent may also attempt to show that no unit employees suffered losses due to the unilateral subcontracting.

*Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest, as prescribed in *New Horizons*, 356 NLRB 6 (2010).

In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall order the Respondent to compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

Finally, we shall order the Respondent to furnish to the Union in a timely manner the information requested by the Union on November 16, 2015.

#### ORDER

The National Labor Relations Board orders that the Respondent, Kankakee County Training Center for the Disabled, Inc., Kankakee, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Unilaterally subcontracting unit production work.
  - (b) Unilaterally subcontracting unit information technology work.
  - (c) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.
  - (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
  - (a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full time and regular part time employees, including Bus Driver, Bus Rider, Bus Rider Floater, Casual Laborer, Order Filler, Casual Labor Lead, Department Lead, Developmental Instructor, Developmental Trainer, Rehabilitation Developmental Trainer, Direct Care, DSP, ADSP, Directional Trainer, Rehabilitation Directional Trainer, Directional Trainer/Transportation, Employment Specialist, Order Fulfillment Bunge, House Manager, IT Tech, Maintenance Worker, Production Floater, Rehabilitation Floater, Semi Driver, Warehouse Overseer, Teacher, and all other employees

as defined by the Act employed by the Employer at its Bradley, Bourbonnais, and Kankakee, Illinois facilities; Excluding Lead Development Trainer, Transportation Supervisor, Professional employees, Business Office Clerical Employees, Confidential employees, Guards and Supervisors, as defined in the National Labor Relations Act.

(b) Rescind the subcontracting of unit production work that was unilaterally implemented in 2015 and restore the status quo ante regarding this work, until such time as the Respondent and the Union reach a collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

(c) Rescind the subcontracting of unit information technology work that was unilaterally implemented in 2016 and restore the status quo ante regarding this work, until such time as the Respondent and the Union reach a collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

(d) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral subcontracting of unit production work in 2015 and unit information technology work in 2016.

(e) Compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) Furnish to the Union in a timely manner the personnel information requested by the Union on November 16, 2015.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Kankakee, Illinois facility copies of the attached notice marked "Appendix."<sup>16</sup> Copies of the notice, on

<sup>16</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also duplicate and mail, at its expense, a copy of the notice to all former employees who were affected by its unlawful conduct. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2015.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2018

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN RING, dissenting in part.

The complaint alleges that the Respondent violated the Act by failing to bargain with the Union about outsourcing IT work to an entity called Duratech in October 2015. I agree with my colleagues that the judge properly dismissed this allegation.<sup>1</sup> The majority goes

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Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup> I agree that the Respondent acted lawfully under the principles stated in *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd. mem. sub nom. Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), and *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). Accordingly, I find it unnecessary to decide whether I agree with all the

on, however, to find that the Respondent did violate the Act by outsourcing other IT work to another entity, Megaplex, on a later date. The unilateral outsourcing of IT work to Megaplex was not alleged in the complaint; it is not closely related to the Duratech allegation and was not fully and fairly litigated at the hearing; and it is not supported by record evidence in any event. Accordingly, I respectfully dissent from this violation finding.

The relevant facts, which are set forth in full in the judge's decision, are as follows. Unit employee Sherry Gregg, the Respondent's sole "IT person," resigned in October 2015. The record specifically indicates that Gregg set up computers and printers. A week later, the Respondent's computers and servers crashed, preventing the Respondent from performing its crucial billing function. On October 14, the Respondent notified the Union of its intent to subcontract its IT work.<sup>2</sup> The Respondent proceeded to subcontract the work to Duratech around October 21, after the Union protested the subcontracting but failed to reply to the Respondent's offer to meet and discuss the issue. Duratech worked on the Respondent's computer systems for about 2 weeks.

More than 7 months later, around June 2016, the Respondent experienced another server crash and contracted with an entity called Megaplex to repair the server and recover data that had been stored on it. The Respondent did not notify the Union about this subcontracting.<sup>3</sup>

As stated above, the complaint did not allege that the Respondent's subcontracting of IT work to Megaplex was unlawful. Undeterred, the General Counsel and the

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limitations those decisions place on an employer's right to act unilaterally in response to exigent circumstances.

For the reasons stated by my colleagues, I also join them in (i) adopting the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(3) and (1) of the Act by suspending and discharging employee Priscilla Williams; (ii) adopting the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) of the Act by separately instructing employees Brian Mazzuchi and Priscilla Williams not to talk about the Union during working time; and (iii) adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide requested personnel information to the Union.

<sup>2</sup> Graham's email to Union Staff Representative Jeff Dexter stated:

As of last week we don't have an IT person as she has resigned. This is very important position here and we will be looking at options with this. At the present time we don't have anyone in house with the skills or qualifications for this job. We are looking at outsourcing this right now until we see which way is cost effective for [the Respondent]. I want you to have notice that we are looking at a company maintaining the computers as it's needed at this time until we decide what is best.

Graham later stressed that the Respondent could not wait for negotiations before fixing its computers.

<sup>3</sup> As of the hearing in this case, the Respondent had not hired anyone to replace Gregg.

Charging Party contend in their exceptions that the Board should reach this instance of unalleged subcontracting and find that it violated the Act. Remarkably, my colleagues agree. Putting the cart before the horse, they first address the merits of this so-called issue, finding the Megaplex subcontracting unlawful on the basis that, unlike the event that precipitated the Duratech subcontracting, the June server crash was foreseeable, and hence no exigency excused the Respondent's failure to bargain over it. There is no evidence that the Megaplex subcontracting even involved bargaining-unit work. Indeed, to the contrary, Graham testified without contradiction that "[w]hen it came to something bigger as far as server issues, the server going down, things like that, [Gregg] would not do that on her own. She would have somebody else come in on the outside to help her do that."<sup>4</sup> Only after concluding that the Respondent's subcontracting to Megaplex would be unlawful do my colleagues consider whether the Megaplex subcontracting is even properly before them in the first place. They find that it is, on the theory that it is closely related to the Duratech subcontracting and was fully and fairly litigated. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). The majority is incorrect on both counts.

It should go without saying that the Board must first satisfy itself that an unalleged violation is properly before it before opining on the merits. And the Megaplex issue is not properly before the Board. It is not closely related to the Duratech subcontract: the two involve entirely separate instances of subcontracting occurring more than 7 months apart. (To bolster their "closely related" finding, the majority backdates the Megaplex subcontracting to "several months prior to June 2016," even though there are no exceptions to the judge's finding that it occurred in "about June 2016.")<sup>5</sup>

<sup>4</sup> My colleagues contend that this testimony actually demonstrates that the work the Respondent subcontracted to Megaplex was bargaining-unit work. They say it proves that when the Respondent needed to fix major server malfunctions, Gregg would "perform that work together with" an outside contractor. This interpretation reads too much into the words "help her," especially in light of uncontradicted testimony that Gregg's duties involved setting up computers and printers. Inflating Gregg's duties even further, the majority finds that Gregg would have played a "significant" role in the Megaplex server repair work based on Graham's testimony that the Respondent subcontracted the prior server work to Duratech because it would have taken too long to hire "somebody in." Of course, the Duratech and Megaplex subcontracts were two different contracts to perform different work. In addition, and contrary to the majority's implication, Graham never testified that the hypothetical "somebody" would have been a replacement for Gregg.

<sup>5</sup> My colleagues reliance on Graham's imprecise testimony regarding the date of the Megaplex subcontracting cannot, in these

The two contracts involved different work as well: the Duratech contract was to *replace* a server, while the judge found that the Megaplex contract was to *repair* a different server and recover data. Indeed, my colleagues themselves distinguish the two instances of subcontracting by finding that the Megaplex subcontract was foreseeable while the Duratech subcontract was not.<sup>6</sup>

Nor was the Megaplex subcontracting fully and fairly litigated. It is well settled that the "fundamental elements of procedural due process are notice and an opportunity to be heard." *Lamar Advertising of Hartford*, 343 NLRB 261, 264 (2002) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). "The primary function of notice is to afford respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990). The Respondent was not placed on notice that the Megaplex subcontracting was at issue. It is true that the record includes some evidence pertaining to it, as the majority notes. But as the Board and courts have observed, "the presence of evidence in the record to support a charge unstated in a complaint . . . does not mean the party against whom the charge is made had notice that the issue was being litigated." *Enloe Medical Center*, 346 NLRB 854, 855 (2006) (quoting *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983)); see also *NLRB v. Quality C.A.T.V.*,

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circumstances, serve as a substitute for the judge's unexcepted-to finding of when the subcontracting occurred.

<sup>6</sup> There is no merit to the majority's view that the Megaplex subcontracting is "part and parcel" of the Respondent's "steadfast refusal to bargain with the Union over the performance of its IT work." Apart from the Megaplex subcontract, the only other instance of IT subcontracting on this record was the Respondent's subcontract with Duratech, and my colleagues *agree* that the Respondent was excused from bargaining over that subcontract by exigent circumstances.

The majority also erroneously finds that the Respondent, in its answering brief, effectively conceded that the record contains all the necessary evidence for ruling on the Megaplex subcontracting. To the contrary, the Respondent emphasized in its answering brief that the judge properly limited his analysis to the allegations in the complaint, which concern the Duratech subcontract. The Respondent additionally stated that no charge was filed "relative to the company named by the General Counsel in the General Counsel's Brief in Support of Exceptions," i.e., Megaplex. In these circumstances, it is simply unfair to characterize the Respondent's statement that the judge's dismissal of the Duratech allegation makes it difficult "to see how other instances of a similar nature would result in a different conclusion" as a concession that it would not have altered its litigation strategy in the face of an additional allegation. A far more plausible explanation for the Respondent's decision not to address the merits of the Megaplex subcontracting issue is that *there is no such issue* and that it believed the Board could be trusted to recognize as much and accord the Respondent due process of law.

*Inc.*, 824 F.2d 542, 547 (7th Cir. 1987) (“[T]he simple presentation of evidence important to a . . . claim does not satisfy the requirement that any claim at variance from the complaint be ‘fully and fairly’ litigated in order for the Board to decide the issue without transgressing . . . due process rights.”). The majority’s finding that the Megaplex subcontracting was fully and fairly litigated cannot be reconciled with these principles.

The determination that the Megaplex issue is not before the Board properly ends the inquiry. However, since my colleagues address the merits, I will do so as well.

I disagree that an 8(a)(5) violation regarding the Megaplex subcontract was established on this record. To show that the Respondent had a duty to provide the Union with notice and an opportunity to bargain before subcontracting work to Megaplex, the General Counsel was required to prove, among other things, that the subcontract involved bargaining unit work. See generally *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). The General Counsel failed to make this showing. As stated by the General Counsel, Gregg’s duties involved setting up computers and printers, while the Megaplex subcontract involved repairing a crashed server and recovering data stored therein. There is no evidence that Gregg ever did, or even could have, performed that work, an issue that Graham highlighted at the hearing.<sup>8</sup> The majority’s finding that the second server crash was foreseeable, and therefore subcontracting to deal with it was subject to the duty to bargain (unlike the Duratech subcontracting), is equally unfounded. No evidence supports the view that the second server crash was any more foreseeable than the first, or, indeed, the notion that any server crash can be foreseen in advance.<sup>9</sup> Nor is there any support for the majority’s implicit finding that the second server crash

<sup>8</sup> For the reasons explained above, the majority’s effort to support their unit work finding with selected bits of record evidence is unavailing. I also disagree with my colleagues’ suggestion that they may properly find that the Megaplex subcontracting involved unit work merely because the Respondent did not contend otherwise in its exceptions or its answering briefs. The Respondent can hardly be faulted for failing to argue this “unit work” point when it was not properly on notice that the so-called issue to which this point is subordinate—the Megaplex subcontract—was indeed at issue. Moreover, the majority *relies* on this absence of exceptions by the Respondent to support its conclusion that the work subcontracted to Megaplex was unit work, even though the judge made no findings on the issue. At the same time, the majority *disregards* the judge’s unexcepted to finding that the Megaplex subcontracting occurred in about June 2016. I can perceive no valid justification for this internally inconsistent analysis.

<sup>9</sup> I cannot accept the majority’s unfounded claim that Duratech’s prior successful replacement of a different server put the Respondent “on notice” that another server would crash.

did not present the same exigent circumstances that justified immediate action when the first server crashed. For all of these reasons, even if I were to reach the issue—and as explained above, I believe the Board cannot do so—the record evidence does not support the majority’s finding that by subcontracting work to Megaplex unilaterally, the Respondent violated Section 8(a)(5) of the Act.

For the foregoing reasons, as to this issue, I respectfully dissent.

Dated, Washington, D.C. August 27, 2018

John F. Ring, Chairman

NATIONAL LABOR RELATIONS BOARD  
APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT unilaterally subcontract unit production work.

WE WILL NOT unilaterally subcontract unit information technology work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining

representative of our employees in the following bargaining unit:

All full time and regular part time employees, including Bus Driver, Bus Rider, Bus Rider Floater, Casual Laborer, Order Filler, Casual Labor Lead, Department Lead, Developmental Instructor, Developmental Trainer, Rehabilitation Developmental Trainer, Direct Care, DSP, ADSP, Directional Trainer, Rehabilitation Directional Trainer, Directional Trainer/Transportation, Employment Specialist, Order Fulfillment Bunge, House Manager, IT Tech, Maintenance Worker, Production Floater, Rehabilitation Floater, Semi Driver, Warehouse Overseer, Teacher, and all other employees as defined by the Act employed by the Employer at its Bradley, Bourbonnais, and Kankakee, Illinois facilities; Excluding Lead Development Trainer, Transportation Supervisor, Professional employees, Business Office Clerical Employees, Confidential employees, Guards and Supervisors, as defined in the National Labor Relations Act.

WE WILL rescind the subcontracting of unit production work that we unilaterally implemented in 2015 and restore the status quo ante regarding this work, until such time as the Respondent and the Union reach a collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

WE WILL rescind the subcontracting of unit information technology work that we unilaterally implemented in 2016 and restore the status quo ante regarding this work, until such time as the Respondent and the Union reach a collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

WE WILL make whole, with interest, all affected employees for any loss of earnings and other benefits suffered as a result of our unilateral subcontracting of unit production work in 2015 and unit information technology work in 2016.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL furnish to the Union in a timely manner the personnel information requested by the Union on November 16, 2015.

KANKAKEE COUNTY TRAINING CENTER FOR  
THE DISABLED, INC.

The Board's decision can be found at [www.nlrb.gov/case/25-CA-166729](http://www.nlrb.gov/case/25-CA-166729) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Raifael Williams, Esq.*, for the General Counsel.  
*Steven Mills, Esq. and Bryan Jones, Esq. (Mills Law Offices)*,  
for the Respondent.

*Melissa Auerbach, Esq., Dowd, Bloch, Bennett, Cervone, Auerbach & Yokich*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on July 19 and 20, 2016, in Kankakee, Illinois. The consolidated complaint, which issued on April 29, 2016, was based upon unfair labor practice charges and amended charges that were filed between December 28, 2015<sup>1</sup> and February 1, 2016, by American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL-CIO (the Union). The complaint alleges that Kankakee County Training Center for the Disabled, Inc. (Respondent), violated Section 8(a)(1) of the Act by prohibiting employees from talking about the Union during working time while permitting them to talk about other subjects, and violated Section 8(a)(3) and (1) of the Act by suspending Priscilla Williams on November 13 and then discharging her on November 19 because of her union and protected concerted activities. It is further alleged that in September and October, the Respondent subcontracted and outsourced bargaining unit work without prior notice to the Union and without affording the Union an opportunity to bargain about this conduct, and that since about November 16 the Respondent has failed and refused to furnish the Union with relevant information that it requested, all in violation of Section 8(a)(5) and (1) of the Act.

### I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### II. FACTS

The Union filed a petition to represent the Respondent's employees and at a Board election that was conducted on Decem-

<sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to the year 2015.

ber 29, 2014, a majority of the employees voted to be represented by the Union. During the campaign Williams was the most (or one of the most) active employee in supporting the Union, soliciting employees to sign authorization cards for the Union. After the Union was certified, she was elected to be the chief steward and is on the Union's bargaining committee. Beginning a few months after the election, the parties began negotiations for a collective-bargaining agreement, and although some issues have been resolved, the parties have not reached complete agreement on contractual terms and negotiations continue. The Respondent conducted one preelection meeting with all of the employees that was led by Steve Mitchell, Respondent's CEO in about early December 2014. Williams and employee Brian Mazzuchi testified that Mitchell asked why they wanted a union and he said that he felt that they didn't need one; that they had an open door policy and the Union only wanted their money. Employee Schwana Murphy testified that Mitchell said that they didn't need a union. Williams testified that in about November 2014 while she was speaking to Diane Graham, the CEO of the Respondent, and previously the Vice President, in Graham's office, Graham asked her why they wanted the Union and Williams said that they wanted to be respected at the job. Graham told her that it didn't bother her either way, whether they get the Union or don't get the Union.

#### November 13 Incident

The principal portion of this hearing involved a disagreement between Williams and employee Anthony Viveros that took place on November 13 at approximately 4:15 p.m. in the parking lot of the Respondent's facility. Williams was suspended on that day and was discharged on November 19 for her actions in that incident; Viveros was not disciplined. Numerous employees and supervisors testified about what occurred on November 13, requiring major credibility determinations. Earlier that day, employee Brian Mazzuchi was called into Production Supervisor Beverly Flowers' office; HR Director Julie Galeaz was also present. He testified that Flowers told him that a fellow employee said that Mazzuchi was "strong-arming him" about the Union. He said that wasn't true, but that the employees had the right to discuss the Union and Flowers said, "No, you do not." He replied that if it didn't interfere with production, they could talk about the Union just like they could discuss the weather and she said that the employees were not allowed to talk about the Union. Flowers testified that she had a verbal counseling with Mazzuchi on November 12 or 13. She had received complaints about him interrupting work of the floor by talking to other employees and interrupting the production and movements of the product although she does not know what he was talking about. She told him that he couldn't interrupt the work; he said okay, and left the office. After he left, Flowers saw Williams nearby and called her into the office and told her that Mazzuchi had been counseled about disrupting other people's work. Williams testified that she was asked by Galeaz to come to Flower's office to talk about an issue that they had with Mazzuchi talking about the Union. They said that Mazzuchi was bullying employees about the Union and that he couldn't talk about the Union on the floor and Williams responded that if they could talk about the weather, they could talk about the

Union. Flowers also told Williams that she was told that Williams was telling people that she (Flowers) couldn't fire anyone, and Williams denied saying that. Flowers said that she had a statement saying that Williams had said that she couldn't fire anyone and Williams said that she didn't care what the statement said, that she never said it and she was not a liar. Flowers never showed her the statement and Williams left the office. Alyssa Royster testified that in early November, while she was at the facility, she and Viveros were discussing a past problem that she had at work and Williams approached them and said not to worry about it: "I'll talk to Bev. Me and Bev, I have it in for Bev, I will take care of that." Viveros testified that a few days prior to November 13, Royster told him that she was afraid of losing her job and Williams overheard their conversation and told her not to worry about it, and that she would help her. She said that as Royster was part of her crew, she would talk to Flowers about it and she did not have to worry about losing her job. Later that day Williams told Viveros that she had spoken to Flowers ". . . and there's no way she can do anything because like I talked to her." Viveros then went to speak to Flowers and asked her if Williams had spoken to her about Royster possibly losing her job, and Flowers told him that she did not have any such conversation with Williams. Flowers testified that shortly prior to November 13, Viveros had come to her office and said that Williams had told him that nobody could get in trouble as long as they were part of her crew. He said that Royster was in trouble and Williams told her that she didn't have to worry because she was part of her crew. Flowers told him that this did not happen and when Williams came into her office, she related this conversation to her.

Royster testified that as she was clocking out on November 13, Williams approached her and asked why Viveros was lying about her and making things up and telling Flowers lies. Royster said that she didn't know what she was talking about and left the building. Williams testified that after clocking out on November 13, she walked to the parking lot and began talking to Royster, who was sitting in the back seat of a car and asked her if she told Flowers that she said that Flowers couldn't fire anybody, and Royster said that she didn't talk to anybody. At about that time, Viveros walked out:

And he approached me, calling out, hollering my name, yelling at me, and then he got closer and called me an F'ing liar, and I said, no, you're the one that's a liar because I never talked to you about anything, and he said, yes, you did, and I said, no, I didn't. I don't talk to you about the union stuff and he said, yes, you did, and why would you want to have a union at this little facility. You all so dumb you want to have a union at a nonprofit facility. And then he went on about that, and...kept saying that I was an F'ing liar, I called him a dumb ass, and he said we're the dummies for having a union at this place . . .

At that time employees Annette Roberts and Carolyn Lawrence were standing behind the car about five to 10 feet from her. Another employee, LeMoris Burtis came out, and Williams called him over to tell Viveros that they had a union, and when Burtis said that they do have a union, Viveros said that they don't have a contract. While this disagreement continued,

Flowers came out to the parking lot and stood between them and told Williams that she had to calm down and be a role model and Williams asked why she was talking directly to her, and Flowers said, "Because you represent the Union." As she and Burtis were walking away, Viveros continued to call them dummies because there was no union contract. She asked Flowers if they had a union, and Flowers said that there was a union, but there was no contract. Flowers told her to calm down and go home and she and Burtis went to their cars. She testified that during this incident, she never threatened to hit Viveros and none of the Respondent's "clients" were present to witness this incident, although one client was sitting on the patio, about 20 to 30 feet away.

April Gaines, who has been employed by the Respondent since March 2014, testified that when she exited the building she saw Williams standing by the car talking to Royster. Viveros came out of the building a few minutes later and started "yelling, screaming and cussing" at Williams. He said that there was no union and she said that there was a union; he called her an F'ing liar and she called him a dumb ass. Other than Royster, Viveros and Williams, the only other employees that she remembers being in the area were Burtis and Schwana Murphy. Gaines gave a statement to Williams after the event that Williams gave to the Respondent on November 19. In the statement, Gaines stated that she was in the car while this incident was taking place and that when Viveros came out of the building, he got loud and Williams got loud asking why did he lie to management about her. During this argument, a client began walking toward them and Williams told him to go back to the facility, which he did; Viveros called Williams an F'ing liar and she called him a dumb ass.

Schwana Murphy, who has been employed by the Respondent for 12 years, testified that Williams and Viveros were "having a conflict." Other than Williams and Viveros, the only other employee that she remembers being in the parking lot at that time is Annette Roberts. She did not see any clients in the area. She heard Viveros tell Williams, "You don't have a fucking union" and Williams called him a dumb ass. She did not hear Williams threaten him. She told Williams to leave it alone and they got in Murphy's car and left. Roberts, employed by the Respondent for 16 years, testified that when she left the building she saw Williams standing alongside a car talking to Royster. Viveros came out of the building and walked to the car and was "... doing hand gesturing and hand movements, and he ... got like in her face," and then backed away, but she could not hear what was said. Carolyn Lawrence, who has been employed by the Respondent for 23 years, testified that when she left the facility Williams was standing by the car talking to Royster. Viveros approached them and said, "What the F are you talking to her for?" She also observed him making hand gestures to Williams, but Williams never moved and she did not hear anything that Williams said. She also gave a statement to the Union to support Williams.

Burtis, who has been employed at the facility for over a year, testified that he left the building shortly after 4:15 p.m. and saw Williams and Viveros "... kind of going back and forth." Viveros was saying that it was dumb to believe that there is a union because Respondent is a nonprofit and she said that there

was a union. Williams called him over and asked if there was a union, and he said that there was a union, and Williams also asked Flowers if there was a union, and she said that there was, but they didn't have a contract. He did not see any clients in the area and both Williams and Viveros were using their hands as they spoke, but he did not hear any profanities or threats of violence. He gave a statement for Williams at the request of another employee which was written by Margo Smith; he read and signed it. He told Flowers that he didn't want to get involved in the incident and was not asked by the Respondent to provide a statement.

Royster<sup>2</sup> testified that after she left the building she sat in Austin Murphy's car in the rear middle seat. Williams came up to the car and asked, "Where's Tony?" and they told her that he was probably clocking out, and should be out soon. At that time she saw a client, Gary, on the patio about 20 feet from the car. As Viveros was walking toward the car, Williams started "storming" toward him and "yelling profanity. . . at him." She accused him of lying about her to management and called him a stupid fucking dummy and a fat piece of shit. At the time she moved to about an inch from his face. While this was occurring, Royster called Flowers to come out and she came out and stood between Williams and Viveros, telling them that they were on work property and had to act professionally. Williams told Viveros, "You're lucky I don't bust you in the lip" and he replied that if she did he would call the police. Williams replied, "Snitches get stitches and wind up in ditches." Flowers told Williams that she had to calm down and leave and she started to walk away and then came back screaming that the Union does not support dumb-dumbs. During this time, Viveros was leaning against the car with his hands in his pocket. Flowers told Williams that she had to stop because "Gary," the client, was nearby, and Williams then walked to her car and left. After the incident she was asked to name the people who witnessed it, and she gave a statement to the Respondent about the incident.

Viveros testified that he left the building and walked to Austin Murphy's car and saw Williams talking to Royster and Murphy. When she saw him she called him a "fucking snitch." He said that he didn't know what she was referring to, and she said that he snitched on her to Flowers and he said that he only told Flowers what she had told him and Royster. She continued calling him names, a liar, a fat piece of shit, an idiot, stupid and a fucking snitch. She then said that he was lucky that she didn't "bust you in your fat lip" and he said that, if she did, he would call the police. She said, "You're a snitch, snitches get stitches and wind up in ditches." He did not raise his voice to her. She then said that he was being stupid and that the Union does not represent dumb-dumbs. He told her that they didn't even have a contract, and she said that we still have the Union and he said, "What's a union without a contract?" She continued to scream at him and he saw that Gary, a client, was about five feet away and told her, "Are you screaming in front of a client. We're

<sup>2</sup> Flowers is Royster's aunt and she lived with Flowers for about 6 months in 2015. In addition, Royster and Viveros dated until shortly before the hearing commenced. Royster gave an affidavit to the Board, but her testimony about it is so confused that it will not be considered.

supposed to be role models for them.” She responded, “That’s Gary. Gary fucking knows me. It doesn’t even matter that they hear.” Flowers then came out, told Gary that he should leave the area and stood between them and Williams began to walk away, but came back and started screaming more names at him. She then walked to her car and left the area. At the conclusion of the incident, Galeaz asked him for the names of the people who were present at the incident, and he gave her the names as well as a statement about the incident.

Although he did not testify at the hearing, Austin Murphy’s statement about the incident was received in evidence. It states:

Priscilla approached my car, sticking her head in my window, looking for Tony, who was in the building. When Tony came outside Priscilla cornered him next to the passenger door, screaming at him. Priscilla called him a “fucking idiot” at which time a client had approached. She then continued to call Tony “a dumb -dumb” and “fucking stupid.” She also told him “snitches get stitches,” and told him “I want to bust your lip open,” and “hit you in your ugly ass face.” All of this was going on while a client was still present. Priscilla continued calling him “stupid and childish” and screamed in his face more, restating that he was a “fucking moron.” She informed him that this was all over him talking behind her back and continued to call him names in front of a client. Then Bev came out and asked Priscilla to calm down. She would not calm down at first, and then eventually left the parking lot eyeballing Tony, telling him to watch his back and started walking back towards Tony a second time. Then Bev told her to leave and she would take care of it and she then proceeded to her car and left, telling Tony to watch out.

Flowers testified that at the time of the incident, she was in her office with Theresa Burley, Respondent’s program manager. She received a call from Royster that Williams was attacking Viveros and she immediately went to the parking lot and told Burley to tell Galeaz to meet her there. When she got outside, Gary<sup>3</sup> had his arms in the air and told Flowers, “You need to handle Priscilla. She’s yelling and cussing.” When she got near the car she saw Williams yelling at Viveros in his face and repeatedly calling him a fucking liar, while he was leaning back against the car. She tried to get between them and told Williams numerous times to calm down and go home. Williams threatened to bust him in the lip and he said that he would call the police. She said that snitches wind up in ditches with stitches. After about 20 minutes she was able to get Williams to go to her car. After Williams left, Flowers told all those present that they should meet with Galeaz to prepare statements of what occurred. Burley testified that after Flowers received a call on her cell phone, she left and told her to get Galeaz to come outside. About 5 or 10 minutes later, as she got outside, she heard Williams yelling at Viveros that snitches get stitches. Flowers was trying to get between them to calm the situation, saying that Williams is supposed to set an example. Williams said that she wanted to put her fucking hands on Viveros and he said that they have to be adults and shouldn’t be saying things like that.

<sup>3</sup> In the statement that she gave about the incident, she did not mention a client being present.

Williams called him a dumb-dumb and said that they have a union. She did not hear him yell, curse her, call her names or threaten her. Flowers was able to get between them and Williams went to her car and drove away.

#### November 19 Disciplinary Meeting

On November 13, Respondent sent a letter to Williams saying that she was suspended immediately without pay pending a pre-disciplinary meeting to be held on November 18. At the same time, the Respondent also sent her a letter entitled: “Proposed disciplinary action” stating:

Please be advised that the employer is seeking discharge based upon an occurrence that happened on 11-13-15. It is reported that you approached another employee called him names cursed at him and threatened the individual. All in violation of KCTC’s gross misconduct policies. Critical Offense: Threatening, intimidating or assaulting an employee/ Use of foul, vulgar language. As a result of the foregoing event a decision has been made to discharge you.

Attached to these letters was Respondent’s Progressive Discipline/Performance policy.

Attending the November 19 meeting were Williams, Jeff Dexter, staff representative for the Union, and Smith, and for the Respondent, Galeaz and Flowers. Williams testified that Galeaz began the meeting by asking Williams if she knew the purpose of the meeting and she said that she did. Galeaz then gave her statements about the incident written by Viveros, Royster, Burley, Flowers and Austin Murphy. She testified that she started to tell them her version of what occurred on November 13, but Galeaz said that they were going to take a break and Flowers and Galeaz left the room to make copies of the statements; when they returned they said that they decided to discharge her. Williams then gave them statements of the incident that she had received from Gaines, Burtis and Ayala.

Smith, who is on the Union’s bargaining committee, testified that Galeaz and Flowers gave them copies of the statements that they had collected about the incident and the Union gave them copies of statements that they had gotten from three employees. Galeaz and Flowers left the office to make copies of the statements and returned about 15 to 20 minutes later and said that they had decided to discharge Williams based upon the evidence that they had gotten. She was asked by counsel for the Respondent:

Q. Would cussing alone be a critical offense?

A. Yes, if clients are around, but between staff, off clock, I would say no.

Dexter testified that at this meeting, Galeaz and Flowers gave them copies of the statements that they had received and Dexter asked them to present their evidence, but they did not respond. He asked what Williams was being disciplined for and, again, they didn’t respond: “They only had documents.” Dexter then said that if it related to the November 13 incident, that was “off the clock” and he was unaware of any policy relating to conduct engaged in off the clock. Williams then gave Galeaz the three statements that they had received and asked if they had interviewed any of those witnesses and they said that they hadn’t. Galeaz took them and said that she wanted to make

copies of them and Dexter told her that they wanted to bargain over the effects of the decision. Galeaz and Flowers left the room to make copies of the statements and when they returned she said that they had made a determination that Williams was terminated. Dexter again said that the Union demanded that the Respondent bargain about the impact and effects of the decision to terminate Williams, and Galeaz said that the meeting was over. There was no bargaining about the decision to terminate Williams.

Galeaz testified that she and Graham decided on the evening of November 13 that Williams would be suspended and she was discharged on November 19. These decisions were based upon her discussions with Viveros, Royster, Burley and Austin Murphy and the statements that they wrote for her. At the meeting on November 19, she explained the reasons why they were meeting and gave the Union copies of the statements they had received and asked if there were any witness accounts that the Union wanted to present or if Williams wanted to give her version of the incident. The only response was that Williams handed Galeaz the three statements that she had obtained, she read them and handed them to Flowers, who also read them. They took them to Graham and decided that the decision to terminate Williams stood. They considered it a Critical Offense, as it involved the use of foul and abusive language threatening employees and was gross misconduct, which provided for termination. Galeaz testified that they didn't interview anyone other than the four individuals who gave statements on November 13 because:

To those that were in the group in the parking lot when I went out to the parking lot, that those were the only staff that were out there, and...all of their statements to me stated that there was no one else in the area.

Although normally she would ask the employee involved to give her a statement of what occurred, in this case she determined that there was no need to ask Williams for a statement based upon what she learned from the four statements that she had received. In addition, the three statements that Williams gave her on November 19 did not refute the facts regarding the Critical Offense that she was charged with.

Flowers testified that at the November 19 meeting, Galeaz handed the Union the four statements and asked if Williams had anything to provide, and Williams gave her the three statements that she had obtained. After Galeaz read each one she passed it to Flowers, who also read them. Dexter asked them to make copies of the statements and they went to Graham's office and told her of the statements. Graham asked if Williams had provided her side of the incident and Galeaz said that she only provided the three statements. Graham testified that after the November 13 incident, they asked the individuals who gave them statements if there was anybody else in the parking lot who would have knowledge of the events and "...every one of the people that gave the statements said there was no one else that was out there that seen it from the beginning to the end." She testified that the initial decision to suspend Williams was a joint decision made by her, Galeaz, and counsel based upon the November 13 incident.

#### Request for Information

On November 16, Dexter wrote to Graham, inter alia:

AFSCME Council 31 has been notified recently regarding discipline being issued to Kankakee County Training Center Employee and Union activist Priscilla Williams. It is our understanding that this unilateral discipline occurred on or about 11/13/2015. The decision to discipline Priscilla Williams obviously has an impact on this employee's hours, wages and working conditions. With that in mind AFSCME Council 31 demands to bargain over the decision, impact and effects of this decision. In addition it is AFSCME's position that if the Employer refuses to bargain with the Union and move forward with its discipline and /or proposed discipline, that decision will be in violation of the National Labor Relations Act (NLRA) and will subject the Employer to an Unfair Labor Practice.

To avoid such a scenario, we request that you retract the discipline of Priscilla Williams, and cease and desist such actions until such time as the Employer and the Union have met and bargained to a mutually satisfactory resolution of this issue. Please provide me with dates that you or your representatives is available to meet to begin the bargaining process over this issue.

Should you refuse to respond to this demand to bargain and /or move forward with this unilateral decision to discipline Ms. Williams, AFSCME Council 31 will view such refusal as a refusal to bargain and will seek resolution through the National Labor Relations Board.

In addition, Please provide any and all information relating to discipline being considered and administered including but not limited to: All Employees /persons involved in the alleged incident; All witnesses the Employer will be interviewing;

The Union steward(s) who will be present during management's interview of the alleged incident;

The names, job titles, and last known address of all persons with knowledge of relevant facts concerning this matter;

The date of hire of all persons who are alleged to have been involved in the alleged incident;

A copy of each of the affected employee's evaluations and personnel file;

The date(s) of interviews that are to be conducted and the Union Official /Steward who will be attending the interviews of witnesses relating to the alleged incidents;

The Union steward(s) who will be present during management's interview of the alleged incident;

Documentation concerning all the affected employee's prior discipline, if any;

Copies of all written or otherwise recorded statements made to the Employer concerning this matter;

Copies of all investigatory reports concerning this matter;

Copies of all rules, regulations, laws, or standards which the employee is alleged to have violated in this matter;

Copies of all records of any pre-disciplinary meetings which were held concerning this matter;

A Complete and concise statement of the charges which were issued concerning this matter;

The names, job titles, and last known address of all persons with knowledge of relevant facts concerning this matter;

Copies of any documents which the Employer considered as support for this disciplinary action;

Copies of any and all documents and a list of witnesses the Employer relied on to issue this discipline.

Please respond within two (2) days of receipt of this letter.

On November 17, Graham sent an email to Dexter stating:

Meeting about this is not a problem at all. We scheduled the pre-disciplinary meeting for Wednesday for that reason. I will give you copies of the statements and the policy that was violated tomorrow.

Dexter testified that the Respondent replied to two of these items, the rules, regulations, and standards requested and the employees' statements. He also testified that he receives a list of Respondent's bargaining unit employees every 3 months and had last received the list in about October. Graham testified that prior to the pre-disciplinary meeting she called Dexter, told him what information she was going to provide, and offered to sit down with him to talk regarding his request, but he never responded to this offer.

#### Failure to Bargain Regarding Subcontracted and Outsourced Work

Mazzuchi testified that in about September he worked with about 10 temporary employees who were employed by Agente Staffing. They performed the same work as he did, and they remained employed by the Respondent for 3 or 4 months. Dexter testified that in about November he was told by Mazzuchi that the Respondent was using temporary employees to perform bargaining unit work.<sup>4</sup> He told Dexter that they employed about 10 temporary employees who were performing bargaining unit work that he normally does and that the Respondent has continued to use these employees to perform bargaining unit work. Dexter was asked if he requested that the Respondent bargain about the use of these employees, and he testified: "We had an ongoing proposal from the initial point as it relates to the use of, or lack thereof, use of non-bargaining unit personnel that we had been representing since January 2015." He testified that this proposal related to both outsourcing and the use of temporary employees. Graham testified that in 2015 the Respondent used Agente and Kelly Services to provide temporary employees to perform production work, when needed. They used be-

tween five and 10 of these temporary workers when needed, depending upon the workload and used additional temporary employees in about April 2016. She testified that she had a conversation with Dexter about it in August: "We also talked about it in contract negotiations that because of the way that our business works, that there are times that we have to use temps." The Respondent has used these temporary employees to perform this work very frequently in the past, as well. Graham also testified that at a negotiating session in April, she told the Union how important it is for them to use temps because of the business fluctuations, and he said that it would not be a problem and that they would negotiate an agreement on the use of temps. She testified that there was a TA on the use of temporary employees, but no overall contract agreed to with the Union. Dexter testified that he did tell Graham that he would agree to the use of temporary workers as part of an overall collective bargaining agreement, but no such agreement has been reached.

The other issue involving subcontracting work involves the Respondent's IT Department. Graham testified that in October, Sherry Gregg, the Respondent's IT person and member of the bargaining unit, resigned and at the same time their computers and servers crashed. On October 14 she sent an email to Dexter stating:

As of last week we don't have an IT person as she has resigned. This is very important position here and we will be looking at options with this. At the present time we don't have anyone in house with the skills or qualifications for this job. We are looking at outsourcing this right now until we see which way is cost effective for KCTC. I want you to have notice that we are looking at a company maintaining the computers as it's needed at this time until we decide what is best.

Dexter responded:

As I am sure you are aware, outsourcing of work without an agreement with the Union is a unilateral change. While the Union understands the situation, it does not negate the Employer's responsibility to negotiate with the Union over this issue.

Graham responded:

Yes. Until we sit and talk, we have to have someone. The computers have went down and KCTC funding is billed through the computer systems, plus all communication as you know. We have the need for them to be fixed and running. We can either schedule to meet right away or wait until October 21st.

Graham testified that after Gregg resigned, their computers crashed and that they couldn't do their billing because their systems were down. Because she didn't hear anything further from Dexter about bargaining on the subject, about a week later the Respondent employed Duratech to correct the situation and they worked on the computer system at the facilities for about 2 weeks. In about June 2016, one of the Respondent's servers crashed and they employed another company, Megaplex, to repair it and to make required changes in their computer system. However, the Respondent has not employed anyone to replace Gregg. Dexter testified that at a bargaining session on

<sup>4</sup> This work is also performed by the clients at the Respondent's facilities as training for possible future employment. It often involves assembling products and it is performed by the clients and the Respondent's employees. Because it is an important tool to use for training the clients, it is important not to lose this work so the Respondent used the temporary employees to help complete the work on a timely basis.

October 21, the Union repeated its position that they were “entitled to the integrity of the bargaining unit” as it related to temporary employees and that “when we should get an agreement, with integrity of bargaining, how that would apply for subcontracting.” No final agreement was ever reached on this issue.

### III. ANALYSIS

The principal allegation is that Respondent suspended Williams on November 13 and discharged her on November 19 in retaliation for her Union and protected concerted activities, in violation of Section 8(a)(3) and (1) of the Act. The evidence clearly establishes that Williams was one of the most (or the most) active supporter of the Union during the organizational drive from September through December 2014 and she has continued her support for the Union as the chief steward and member of the Union’s Bargaining Committee. The question therefore is whether she was suspended and discharged because she engaged in this activity, or whether she was discharged because of her actions on November 13. Under *Wright Line*, 251 NLRB 1083, 1089 (1980), in Section 8(a)(3) or (1) cases turning on employer motivation, the General Counsel must first make a prima facie showing sufficient to support the inference that the protected conduct was a “motivating factor” in the employer’s decision. If that is established, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct.

Clearly, the Respondent was aware of Williams’ extensive union activity, if not before the election, then certainly after the election when she was on the Union’s bargaining committee and was selected to be the chief steward. That the Respondent suspended her shortly after the incident and did not question any employee other than Viveros, Royster, Murphy, Flowers and Burley and discharged her on November 19, without disciplining Viveros establishes the prima facie showing required by *Wright Line*, supra. Whether the Respondent would have suspended and discharged her even in the absence of her protected activity is a much more difficult question, requiring difficult credibility determinations regarding the events of the afternoon of November 13. In making these findings I have taken into consideration, and find that, considering the nature of the dispute between Williams and Viveros, Williams instigated the incident after learning from Flowers that Viveros asked her whether what Williams said about her alleged influence at the facility was true as Williams and Royster each testified that when Viveros came outside Williams asked her if they told Flowers that Williams said that she (Flowers) couldn’t fire anyone. I have also taken into consideration the lack of evidence of union animus on the part of the Respondent. During the campaign, the Respondent only had one meeting of the employees where Mitchell asked why they wanted a union and that he felt that they didn’t need one. In addition, Graham told Williams that it didn’t bother her either way whether the employees had a union or didn’t have a union. What I haven’t considered is the Union’s argument that Williams’ actions on November 13 were not grounds for termination because it occurred after she clocked out. As the incident occurred at the Respondent’s facility, I reject this argument.

Based upon the above, and my observation of the witnesses, I found Burtis and Flowers to be the most credible and I credit Flowers’ testimony over that of Mazzuchi and find that she counseled him for interrupting work, rather than talking about the Union and therefore recommend that this 8(a)(1) allegation be dismissed. As regards the November 13 incident, although I do not believe that Viveros’ actions were as innocent as is portrayed in his and Royster’s testimony, I credit Flowers’ testimony that when she got there, she saw Gary in the area and Williams was calling Viveros a fucking liar and was threatening to hit him. And, although she stood between them, it took a while before she could convince Williams to leave and go to her car. Based upon this credited testimony, I find that the Respondent has satisfied its *Wright Line* burden and recommend that this allegation that Williams was suspended and discharged in violation of Section 8(a)(3) and (1) of the Act be dismissed. Counsel for the General Counsel’s brief requests that I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over Williams’ suspension and discharge. However, as this is not alleged in the complaint, I will not make such a finding.

The complaint next alleges that the Respondent violated Section 8(a)(5) by failing and refusing to provide the Union with certain of the information that it requested on November 16: a copy of the personnel files, evaluations and past discipline of all bargaining unit employees, and a copy of Williams’ personnel file, evaluations and past discipline. The evidence establishes that after receiving the Union’s information request, the Respondent gave the Union a copy of the statements that it received as well as their Rules and Regulations, but not the other information requested, including the two items stated above. Section 8(a)(5) requires an employer to furnish the Union representing its employees with information that is relevant to the union in the performance of its bargaining responsibilities. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979), and information about terms and conditions of employment of bargaining unit employees is presumptively relevant and must be produced. It is well established that an employer must provide a union with requested information “if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees’ exclusive bargaining representative.” *Associated General Contractors of California*, 242 NLRB 891, 893 (1979), enf’d. 633 F.2d 766 (9th Cir. 1980). The personnel files, evaluations, and past discipline of Williams and all bargaining unit employees would have been relevant to the Union in attempting to establish disparate treatment of Williams at the November 19 meeting. By failing to furnish the Union with this information prior to the meeting, the Respondent violated Section 8(a)(5) of the Act.

The final allegation is that by subcontracting bargaining unit work and using temporary employees to perform the work, and by outsourcing the IT work after Gregg left its employ, without prior notice to, or bargaining with, the Union, the Respondent violated Section 8(a)(5) of the Act. As regards the allegation that the Respondent failed to bargain with the Union about outsourcing the IT work to Duratech, the Board recognizes an exception in these 8(a)(5) and (1) cases where the employer can

establish a “compelling business justification,” for the action taken. *Winn-Dixie Stores, Inc.*, 243 NLRB 972, 974 fn. 9 (1979), or where “economic exigencies compelled prompt action.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The Board recognizes as “compelling economic considerations” only those “extraordinary events” which are “an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.” *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987); *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), and the employer carries a heavy burden of demonstrating that this particular action had to be implemented promptly. *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994), *enfd.* 136 F.3d 727 (11th Cir. 1998); *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992). Even where the employer has satisfied these requirements, it must also demonstrate that the exigency was caused by external events beyond its control or was not reasonably foreseen. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995).

I find that the Respondent has established a “compelling business justification” for subcontracting the IT work to Duratech after Gregg resigned. The evidence establishes that its computer system crashed curtailing its ability to bill for work performed and, presumably, obtain funding for its operations, and without funding, they would be unable to pay their employees. This is similar to the facts in *Central Rufina*, 161 NLRB 696 (1966), where the employer was in the business of grinding sugarcane into raw sugar, a seasonal operation. After its mill developed major mechanical difficulties, greatly decreasing its grinding operation, in order to avoid spoilage of the sugarcane, the employer decided to cease grinding at a loss and to subcontract the grinding work to other mills. In reversing the trial examiner, and finding no violation, the Board stated:

Unlike *Fibreboard* and related cases, the Respondent in the instant case was not seeking to gain an economic advantage at the expense of its employees or of the Union. Rather, the Respondent was faced not only with the inability to operate efficiently because of matters beyond its control, but also, in view of the curtailment of its bank credit on which the Respondent’s operation was completely dependent, with the inability to operate at all. It would appear, therefore, that in the circumstances of this case, the factors which lead to the Respondent’s decisions to subcontract and to terminate its grinding are not “peculiarly suitable for resolution within the collective bargaining framework [citing *Fibreboard*, 379 U.S. 203, 213–214];” on the contrary, it seems certain that no amount of give-and-take in the bargaining negotiations could have forestalled the Respondent’s inevitable decision to cease operations for the season.

As I find the Respondent’s dilemma analogous to that of the employer in *Central Rufina*, I recommend that this allegation be dismissed.

The remaining issue is whether the Respondent subcontracted bargaining unit work to temporary employees without prior notice to the Union and without affording the Union an opportunity to bargain about it, in violation of Section 8(a)(5) and (1) of the Act. The evidence establishes that in September, Maz-

zuchi reported to Dexter that the Respondent was employing temporary employee to perform work that is performed both by Respondent’s clients and by bargaining unit employees. At the time, the Union had an outstanding bargaining proposal that would have restricted the Respondent from using such employees and the Respondent had not previously notified the Union that it had obtained temporary employees from Kelly to perform this work. In *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 458 (2004), the Board stated: “the Board has held that subcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature and direction of the enterprise.” Further, even where the employer had a past practice in the performance of its work, when a union has been newly certified, the employer must bargain with the union about “the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees,” rather than continuing the practice, as it did here. *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001). By employing temporary employees to perform the work that unit employees regularly perform, without notice to, or bargaining with, the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to furnish to the Union all the information that it requested on November 16, which information was relevant to the Union as the collective bargaining representative of certain of the Respondent’s employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. By subcontracting certain bargaining unit work to temporary employees, in about September, without prior notice to or bargaining with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. The Respondent did not violate the Act as further alleged in the Consolidated Complaint.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In this regard, I recommend that the Respondent be ordered to negotiate with the Union prior to employing temporary employment agency employees and, if any temporary employees are still employed by the Respondent in this unit, to restore the *status quo ante* by restoring the unit to where it would have been absent the employment of these temporary employees. Further, I would leave for the compliance stage the determination of whether backpay is due because of the employment of these temporary employees. *Gunderson Rail Services, LLC*, 364 NLRB No. 30 (2016). I would also recommend that within 20 days of receipt of this Decision, the Respondent furnish the Union with a copy of the

personnel files, evaluations, and past discipline of all bargaining unit employees and a copy of Williams' personnel file, evaluations, and past discipline.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

### ORDER

The Respondent, Kankakee County Training Center for the Disabled, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) Failing and refusing to notify and bargain with the Union over the use of temporary employees.

(b) Failing to furnish the Union with information that it requested, which information was relevant to the Union as the bargaining representative of certain of the Respondent's employees.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Notify and bargain with the Union prior to the employment of temporary employees to perform work performed by the bargaining unit employees.

(b) Within 20 days from the receipt of this Decision, furnish the Union with copies of the personnel files, evaluations and past discipline of all bargaining unit employees, including Williams.

(c) Within 21 days after service by the region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps that the Respondent has taken to comply.

(d) Within 14 days after service by the region, post at its facility in Kankakee, Illinois, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2015.

<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. September 14, 2016

### APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT employ temporary employees in bargaining unit positions without first notifying and bargaining with American Federation of State, County and Municipal Employees (AFSCME) Council 31, AFL-CIO (the Union).

WE WILL NOT refuse to furnish the Union with information that is relevant to it as the collective-bargaining representative of certain of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the rights guaranteed to you by Section 7 of the Act.

WE WILL notify and bargain with the Union prior to employing temporary employees in bargaining unit positions.

WE WILL furnish the Union with the information that it requested on November 16, 2015.

KANKAKEE COUNTY TRAINING CENTER FOR THE  
DISABLED, INC.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/25-CA-166729](http://www.nlrb.gov/case/25-CA-166729) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

